**Parkview Nursing Center II Corp. *and* District Union 427, United Food and Commercial Workers International Union, AFL-CIO-CLC.** Cases 8-CA-13706[1] and 8-CA-14069

February 16, 1982

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 21, 1981, Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order,[4] as modified herein.[5]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Parkview Nursing Center II Corp., Warren, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Offer those employees, who were denied reinstatement on June 4, 1980, because they participated in an unfair labor practice strike, full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered as a result of the Respondent's unlawful conduct, with interest, as outlined in 'The Remedy' portion of this Decision."

## DECISION

### STATEMENT OF THE CASE

PHIL W. SAUNDERS, Administrative Law Judge: Based on charges filed on April 3 and July 29, 1980, by District Union 427, United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union or the Charging Party,[1] an amended consolidated complaint was issued on September 26, 1980, against Parkview Nursing Center II Corp., herein called Respondent, Company, or Nursing Home, alleging violations of Section 8(a)(1), (3), and (5) of the Act. All parties filed briefs in this matter.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Respondent is a corporation duly organized under and existing by virtue of the laws of the State of Ohio, with its facility and place of business located in Warren, Ohio, where it is engaged in the operation of a nursing home.

Annually, Respondent derives gross revenues in excess of $100,000 from its business operations, and receives products valued in excess of $50,000 directly from points located outside the State of Ohio.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The Charging Party and Local Union 200 are labor organizations within the meaning of Section 2(5) of the Act.

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[1] This case was incorrectly cited by the Administrative Law Judge as Case 8-CA-13076.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] While the individual proposals made by the Respondent at the bargaining table do not by themselves constitute *per se* violations of the Act, it was, as found by the Administrative Law Judge, the "totality of Respondent's conduct both at and away from the bargaining table" which clearly demonstrated the Respondent's intent to frustrate any meaningful bargaining with the Union and which constituted a violation of Sec. 8(a)(5) and (1) of the Act.

[4] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[5] We agree with the Administrative Law Judge that the Respondent violated Sec. 8(a)(3) and (1) of the Act by refusing to reinstate certain unfair labor practice strikers upon their June 10, 1980, unconditional offer to return to work and that the Respondent's backpay obligation began as of June 10, 1980, the date such offer was made. *Newport News Shipbuilding & Drydock Company*, 236 NLRB 1637, 1638 (1978). See also *Drug Package Company*, 228 NLRB 108, 114 (1977).

In his recommended Order, the Administrative Law Judge inadvertently failed to include a provision requiring the Respondent to reinstate the unfair labor practice strikers. We shall modify his recommended Order to include such a provision.

[1] It is undisputed that District Union 427 has acted as agent for Local 200, United Food and Commercial Workers International Union, AFL-CIO-CLC, the certified bargaining representative herein, for the purposes of collective bargaining with Respondent since in or about May 1979. Further, since on or about the above date, attorney Gregory J. Miller has acted as a negotiator for the Union in the collective-bargaining negotiations involved herein, and Business Representative Roy Archer has acted as the Union's agent for purposes of collective bargaining from May 1979 to the present.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

The amended complaint alleges that, commencing on or about the dates set forth below, Respondent has refused to bargain collectively with Local 200 as the bargaining representative of the employees in the unit by the following acts and conduct[2]—that on or about December 10, 1979, at a motel in Canton, Ohio, Respondent's representative, Rayford Blankenship, told negotiators for the Union that Respondent's president, Robert Leatherman, had not made up his mind as to whether he would sign a contract with the Union; that on or about December 15, 1979, Respondent unilaterally changed its sick pay policy; that in February 1980, Respondent reduced its monetary proposal to the Union by offering to pay minimum wage to all non-LPN employees, and $3.85 per hour to all LPN employees and that this would have resulted in a loss of wages to both categories of employees considering the offer that Respondent had originally made to the Union in September 1979; that in bargaining on or about February 6, 1980, Respondent proposed an agency-shop provision to the Union but that on or about February 12, 1980, withdrew its agency-shop provision and has thereafter proposed an open-shop provision in negotiations with the Union; and that in or about February and March 1980, during negotiations, Respondent's negotiators indicated to the Union a lack of authority to negotiate for Respondent.

It is further alleged that the strike, starting on April 21, 1980,[3] was caused by Respondent's unfair labor practices; that on June 4, 1980, by means of a letter signed by the strikers, the Union notified Respondent of their unconditional offer to return; and that on June 18, 1980, Respondent refused to reinstate the employee strikers.

It appears that on or about February 12, 1976, the Regional Director for Region 8 certified Local 200 as the exclusive collective-bargaining representative of a unit of Respondent's service, maintenance, and technical employees, including licensed practical nurses. However, Respondent contested the Board's unit determination in an unfair labor practice proceeding and which was not resolved until the United States Court of Appeals for the Sixth Circuit issued its decision in May 1979 (G.C. Exh. 2), sustaining the Board. As a result of this litigation, the first bargaining sessions between the parties herein did not take place until August 1979. There were approximately 20 or so bargaining sessions between August 1979 and April 17, 1980, when negotiations broke off.

Respondent was represented at almost all of the negotiations by its chief negotiator, Rayford Blankenship, while the Union was represented by attorney Gregory Miller and Business Representative Roy Archer. In the early months of the negotiations, Respondent was also represented by attorney Ted Chuparkoff, but on or about March 21, 1980, Chuparkoff was replaced as counsel for Respondent by attorney Thomas Palecek. In addition to the above, Robert Leatherman, either principal or sole owner of Respondent, attended the first two sessions, and on a few other occasions was present in the motel where negotiations were being held and was also available by telephone. Further, the comptroller for Respondent was also at the motel where bargaining sessions were held on two occasions, and it appears that the Union was aware that the comptroller was present for the purposes of providing financial information, but never requested to talk to him. The present administrator for the Nursing Home, Anthony Pucillo, was also present at each bargaining session but one.

During the negotiation sessions between the parties, Respondent accepted several proposals made by the Union and, conversely, the Union accepted a considerable number of proposals made by Respondent. In fact, Respondent's attorney, Ted Chuparkoff, testified that by late February 1980, he thought the parties had resolved all of the noneconomic issues.

Turning to the allegation that bad faith is indicated in that on December 10, 1979, Respondent informed the Union that President Robert Leatherman had not made up his mind as to whether he would sign a contract.

The General Counsel produced testimony through Gregory Miller, one of the negotiators for the Union, to the effect that on or about December 10, 1979, he met his fellow negotiator, Roy Archer, at the Holiday Inn, Belden Village, Canton, Ohio, and they were then joined at the motel dining room, around 10 p.m., by Respondent's chief negotiator, Ray Blankenship, for the purpose of meeting informally in order to expedite negotiations scheduled for the following day in Akron, and testified that on this occasion Blankenship stated that Leatherman had not made up his mind yet whether he would even sign a contract with the Union. Miller was corroborated in this respect by Roy Archer who also stated that the meeting was held at the Holiday Inn, Belden Village, Canton, Ohio, and was certain of this because Miller stayed at his home in the North Canton area that evening rather than renting a hotel room or returning to Cleveland. Archer stated that the meeting in question was held in the restaurant and Blankenship did not arrive until around 10 p.m. due to transportation problems from the airport, and then told them that he did not know if Leatherman had made up his mind whether to enter into a contract with the Union.

Blankenship denied that he had ever made such a remark; denied that he ever met privately with Archer or Miller prior to December 11; and denied meeting with Archer and Miller in Canton or North Canton, Ohio, at the Holiday Inn. Moreover, evidence was presented that Blankenship had flown by Allegheny Airlines from Indianapolis to Cleveland, and from there a limousine service had taken him to the Exchange Street Holiday Inn in

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[2] Admittedly, the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All service and maintenance employees, technical employees, including licensed practical nurses [LPNs] employed at the Employer's facility located in Warren, Ohio, excluding all business office clerical employees, professional employees, guards and supervisors as defined in the Act.

[3] On April 2, 1980, the Union delivered a letter to Respondent in compliance with Sec. 8(g) of the Act, indicating it intended to strike on April 14, 1980. On April 9, attorney Palecek for Respondent, and attorney Miller for the Union, signed an agreement indicating that the Union intended to initiate a work stoppage on Monday, April 21, 1980, at 7 a.m. in the event the Union decided not to strike on April 14.

Akron, Ohio, where he was staying,[4] and where the bargaining session would be held the next morning.

Counsel for Respondent argues that Blankenship did not make the statements attributed to him by Miller and Archer on the basis that this remark is alleged to have been made away from the bargaining table at a private meeting between the negotiators, and the remark was allegedly made at a motel at which a bargaining session had never occurred and where Blankenship had never been back to after October 1979.

Counsel for Respondent further argues as follows:

> Consider, then, whether it is the least bit feasible, that an employer had not made up his mind to sign a contract, when he had hired a chief negotiator from Indiana to handle his bargaining sessions and was paying him for his time and his travel to and from these negotiating sessions; that he had authorized proposals to be presented to the Union; that he had actually attended sessions with the Union, that he had actually spent 2 days sitting in the Holiday Inn awaiting a call from the Union to discuss certain financial matters, that he had brought his comptroller with him on two other occasions, for purposes of discussing financial matters with the Union; that he had offered to let the Union see his books, that he authorized a monetary proposal, specifically in February of 1980; that he met with his chief negotiator and administrator prior to all bargaining sessions. The foregoing are not the acts of someone who is in the process of refusing to bargain with the Union. The fact that the Union negotiators are attempting to disparage the owner of a nursing home with unsupported allegations allegedly made away from the bargaining table, casts a great cloud upon this allegation as well as others in this unfair labor practice charge.

After my consideration of all the testimony in respect to this allegation and arguments in relation thereto, I have credited the testimony of Miller and Archer.[5] As pointed out, first of all it is entirely logical that Miller should spend the night at Archer's residence after meeting with Blankenship at the nearby motel in North Canton, Ohio. Both Archer and Miller clearly recall Blankenship telling them that Leatherman had not made up his mind whether he would sign a contract with the Union. On the other hand, Blankenship maintains that he did not make the statements here in question, and also maintains that he was not at the Belden Village motel on the evening of December 10, and in support of this assertion he provided a receipt for a hotel room at a hotel in Akron, Ohio. However, it is noted that the Holiday Inn in Belden Village in Canton and the Holiday Inn on East Exchange Street in Akron are only a short distance apart and, of course, the fact that Blankenship had a room receipt for the evening of December 10 for a motel approximately 15 miles or so from the North Canton Holiday Inn does not preclude a conclusion that Blankenship met and spoke to the union negotiators at the North Canton motel on the same evening, as he could have easily traversed the relatively short distance between the Akron motel and the Canton motel. I have concluded that during the evening in question Blankenship did, in fact, inform Miller and Archer that his client had not made up his mind whether or not he would sign a contract with the Union.[6] As indicated, it is also significant that Blankenship testified that he "normally" met with Chuparkoff, Pucillo, and Leatherman on the nights before a negotiation session as a "standard practice," yet Chuparkoff, Leatherman, and Pucillo were called as witnesses by Respondent, and none of them testified as to meeting with Blankenship on December 10 at the Akron motel. Moreover, additional events, which will be further detailed later herein, also reveal considerable substantiations for my conclusion here.

Turning to the allegation that Respondent failed to bargain in good faith in that on or about December 15, 1979, Respondent unilaterally changed its sick pay policy.

The General Counsel produced testimony through employee Diane Smolinsky to the effect that she worked at Respondent's Warren nursing home from August 1974 to October 1978, and then returned there in February 1979, and continued to work at this facility until she went out on strike in April 1980. She testified that in February 1979, William Hoffman, the administrator of the Home at that time, told her of Respondent's sick pay policy wherein employees were entitled to 6 days per year. According to Smolinsky, this policy was instituted in January 1979, and, if an employee did not use the 6 sick days during 1979, the employee would receive monetary compensation for all unused sick days at the end of the year. Smolinsky testified that she took none of her 6 sick days in 1979, and that, in Janaury 1980, she complained to a man by the name of Masinko, who was an official of the

[4] See Resp. Exh. 6.

[5] It should be noted and pointed out that the credited testimony and facts found in this Decision are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial records and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction to the finding herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. As has been frequently indicated in these types of cases—ultimate choice between conflicting testimony rests on the demeanor of the witnesses, the weight of the evidence, the established or admitted facts, the inherent probabilities, the reasonable inferences drawn from the record and events, and, in sum, all of the other variant factors which a trier of fact must consider in resolving credibility. For the most part, I have found the witnesses for the Union in this case to be open, straightforward, spontaneous, and convincing witnesses with more, precise memory and recollection of the events and details involved, as will be set forth and discussed herein.

[6] I have reached the above conclusion solely on the basis of the evidence and events in *this* record, and without any reference or reliance on any prior labor case in which Ray Blankenship may have been a witness. Counsel for Respondent also objects in his motion to dismiss or strike to a certain map which the General Counsel attached to his brief—but regardless of whether Respondent had prior knowledge that such map would be attached--I have not in any way relied on such attachment. However, the distance between the two motels is a pertinent matter and certainly an arguable issue of fact properly before me since both locations were specifically mentioned by the witnesses involved, as aforestated. On the basis of the above, Respondent's motion to strike, to dismiss, or for a new hearing, is hereby denied.

Nursing Home, and he attempted to rectify the matter by contacting Respondent's home office, but was never able to obtain compensation for her in accordance with the information she had previously received from the former administrator, Hoffman. Smolinsky stated that she also attempted to obtain her sick day payment from Anthony Pucillo, but received no satisfaction. Smolinsky testified that she had worked full time for the Nursing Home since she reentered its employ in February 1979—a scheduled 37-1/2 day week.

Ersie Stubbs began working for the Nursing Home on or about June 30, 1978, and testified that during the winter of 1978–79, she attended a meeting of employees at which former Administrator William Hoffman advised employees that Respondent's president, Leatherman, had decided to give employees 6 paid sick days, and indicated it would be like getting an extra week's pay for Christmas since the employees would receive pay for unused sick days on or about December 10, 1979. However, when Stubbs received her paycheck on or about December 10, 1979, she only received payment for 2-1/2 unused sick days. She testified she could not understand the low amount since she had not used any of her 6 sick days and was entitled to 6 paid sick days. She complained to Masinko but was then advised that, since the "policy book" did not go into effect until July 1979, she was only awarded pay for 2-1/2 unused sick days.

The General Counsel is taking the position that Respondent instituted a sick pay policy in early 1979 through Administrator Hoffman and then unilaterally changed it on December 15, 1979. However, Respondent maintains that its sick-day benefits were based on provisions outlined in a policy book effective July 1, 1979.

The General Counsel points out that the testimony of employees Stubbs and Smolinsky reveals that they were notified during the winter of 1978–79 by William Hoffman, then administrator of the Nursing Home, that during the following year they would receive 6 paid sick days and would be paid in December 1979 for all sick days that they had not used. Moreover, argues the General Counsel, Respondent never called Hoffman during the hearing to deny the statements, and, consequently, an inference is warranted that, if Hoffman had been called by Respondent, he would have testified unfavorably to Respondent's case and would have indicated that he did make the announcement as to the 6 paid sick days as testified to by Stubbs and Smolinsky, and, in light of all such testimony, Respondent's defense that the sick pay plan was not announced until the summer of 1979 when employees received copies of the plan in an employee policy book is without merit—accordingly, it is the position of the General Counsel that Respondent unilaterally changed its sick pay policy by paying its employees less than the amount called for as a result of Hoffman's announcement.

As pointed out, General Counsel's Exhibit 3 is the policy book instituted by Respondent and which has an effective day, July 1, 1979. This policy book sets forth that an employee will be paid for unused sick pay at the rate of one-half day per month or 6 days per year and that the unused sick-pay days will be paid on the December 15 pay period. Diane Smolinsky, a witness on behalf of the Union, testified on cross-examination that she received her policy book in June 1979, that it was to be effective July 1, 1979, and this was the first policy book she had received. Ersie Stubbs, another witness for the General Counsel, as aforestated, indicated that she learned during negotiations that the sick pay was to be paid on the basis of half a day per month, and she also indicated that the parties had gone through the policy book at the negotiation sessions. She then admitted that when the initial announcements concerning sick days were made earlier in 1979, Administrator Hoffman did not say when the sick days would become effective, and further stated that, in negotiating sessions during August, September, October, and November 1979, there were discussions concerning the policy book, and this is when she found out that the policy book was effective July 1.

I am in agreement with counsel for Respondent that simply on the testimony of the General Counsel's own witnesses there can be no basis for this allegation of a unilateral change in sick pay policy. Roy Archer, the chief negotiator, admitted in his own testimony that the policy book was discussed in September, October, and November 1979. Ersie Stubbs and Diane Smolinsky even support Respondent's position that a half day per month was to be paid, and the date of the policy book was effective July 1, 1979, and to be paid in December 1979. While Smolinsky and Stubbs had some impressions or believed that sick leave would be paid starting in early 1979 due to statements by Hoffman, neither one could testify as to his definite pronouncement as to when such benefits would actually start. Moreover, at no time has the Union ever argued that Respondent did not pay employees what they were to receive, but rather that the policy was changed with regard to the effective date of the sick pay provisions. The General Counsel has not sustained the burden of proof in this instance, and, accordingly, this allegation is hereby dismissed.

Another allegation of bad-faith bargaining is that in February 1980 Respondent reduced its monetary proposals.

Union negotiator Gregory Miller testified as to Respondent's position in respect to wages and fringe benefits. Initially, in September 1979, or thereabouts, Respondent, through its chief negotiator, Blankenship, indicated that the position of the Company was to maintain the status quo regarding wages and fringe benefits. However, on or about February 5, 1980, the union presented its second economic proposal package, and, on the next day, according to Miller and Archer, Blankenship responded by stating that non-LPN employees would receive the minimum wage, and then offered LPNs $3.85 per hour. According to Miller, Blankenship proposed no fringe benefits for part-time employees specifically referring to vacation pay, holiday pay, and funeral leave. Miller testified that at this time part-time employees were enjoying most of the fringe benefits enjoyed by full-time employees. Miller stated that he responded to this wage proposal by asking Blankenship whether he was aware that certain non-LPNs were making more than $3.85 per

hour. Blankenship's response was brief and to the point "Well—that is our proposal."[7]

Blankenship testified that at the negotiating session on February 6, 1980, he presented some economic proposals relating to full-time and part-time employees—that all employees had just received it, and they would bring the LPNs to $3.85 per hour—those not already at this rate.[8] He also stated that on this occasion there were discussions on vacation eligibility, backdating seniority, sick days, and additional days off. Blankenship admitted that the Union then asked if these proposals did not represent a reduction of wages and benefits to employees, and testified that in reply he stated that Respondent did not and would not take anything away from any of the employees that they currently had.[9]

In essence, the General Counsel is maintaining that by reducing its monetary proposal in February 1980, Respondent presented another incident considered indicia of a course constituting bad-faith bargaining.[10]

Counsel for Respondent points to the testimony of Blankenship wherein he stated that Respondent would not take anything away from any of the employees that they currently had, and that this was in a direct response to a question of Greg Miller as to whether or not Respondent was in fact taking away certain money from some of the employees. Ted Chuparkoff's testimony was in corroboration of Blankenship, and who also stated that this was the last time any question was ever raised concerning the reduction of wages of any of the employees. Counsel for the Company argues that, if, in fact, the Union had sincerely believed that management was proposing to reduce wages for employees who were earning more than what the monetary proposal was, then there would have been extensive discussions concerning why Respondent was presenting such a proposal, but, to the contrary, there were no lengthy discussions concerning that proposal because the Union knew that Respondent was not going to reduce any wages for an employee who was earning more than the minimum wage or more than $3.85 per hour.

At the start of the negotiations, Respondent's wage offer to the Union was merely a continuation of the status quo. There is also testimony by Attorney Chuparkoff to the effect that, on several occasions during the negotiations, he stated that the financial condition of Respondent was such that management could not increase operational costs, and, therefore, Respondent's negotiators took the viewpoint that they were not in a position to give any wage increases.

In the final analysis, this record shows that in February 1980, after numerous bargaining sessions, Respondent's chief negotiator, Rayford Blankenship, made a lesser and regressive offer of minimum wage to all non-LPNs, and $3.85 per hour to LPNs, and evidence in this record indicates that at least two or three non-LPNs were making in excess of the minimum wage in February 1980, and four LPNs were making in excess of $3.85 per hour at that time. Consequently, after several months of negotiation, Blankenship was making a reduction in certain instances in Respondent's wage offer and to the detriment of several employees in the bargaining unit. I have rejected Respondent's testimony to the effect that Blankenship gave assurances that no employee would receive less than that being currently paid. The credited evidence shows that when Miller specifically asked this question, Blankenship merely replied, "Well, that is our proposal."

Here, imposing its own procedural straitjacket on the negotiations, Respondent first sought the Union's agreement to tentatively resolve all noneconomic issues prior to meaningful discussion of economics, and then—when Respondent did offer its economic proposal—it presented an unacceptable position on wages for the reasons heretofore given. In this respect, Respondent's purpose and conduct in the instant case is not too far different from that found violative of Section 8(a)(1) and (5) in *Yama Woodcraft, Inc. d/b/a Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337, 1342 (1977).

To show later wage proposals, and in so doing revealing the full totality and sequence of events in this record, it should also be noted that as the negotiations began to reach a crucial stage on or about April 9, 1980, Blankenship indicated that he had a proposal that would satisfy the Union, and which would permit the Union to extend its original strike deadline, and, accordingly, on April 12, 1980, he sent a telegram addressed to Miller and Archer, and then called Miller at his residence on Saturday, April 12, 1980, to orally relay the contents of the telegram to him. In essence, Respondent's telegram accepted several proposals by the Union (jury duty, medical exams, unused sick days, a paid break period, call-in pay, overtime for holiday work, and severance pay). Moreover, Respondent agreed to grant a 6-percent increase in wages during the first year of the contract on a merit basis, 8 percent on the second year on a merit basis, and 6 percent for the third year on a merit basis.[11]

The next bargaining session was held on April 14, 1980, and the Union made its economic counteroffer. Miller testified that the Union's counteroffer was close to

[7] Anthony Pucillo, Respondent's administrator, admitted on cross-examination that four LPNs (Reed, Rocco, Youngman, and Stash) employed by Respondent prior to the negotiating sessions in February 1980, were making in excess of $3.85 per hour. Moreover, a non-LPN employee, Walter Miller, a part-time maintenance man who was in the bargaining unit, received in excess of $2.90 per hour as of August 1, 1979, and had already received a raise to $3.41 per hour by July 15, 1978. In addition, Annie Staggers and Gerry Williams, whom the parties also agreed to include in the unit, received in excess of the $2.90 per hour minimum wage prior to January 15, 1980, and in excess of $3.10 per hour minimum wage after January 15, 1980.

[8] Leatherman testified that he authorized this monetary proposal and that $3.85 per hour proposal for LPNs would not affect those employees earning more than this amount.

[9] While not directly in issue in this case, there was, nevertheless, some testimony relative to fringe benefits, and it was Blankenship's understanding that anyone who worked less than 20 hours did not get certain fringe benefits. He also stated that Respondent had four classifications—regular full-time, regular part-time, and casuals—but under his proposal employees who worked on a regular part-time basis, even if for only 8 hours, would be entitled to fringe benefits.

[10] The nature of this allegation is specifically in relation to a monetary proposal Respondent was offering to reduce wages to employees who were already earning more than the amounts proposed and does not relate to fringe benefits.

[11] See G.C. Exh. 10.

Blankenship's offer set forth in General Counsel's Exhibit 10, but the Union eliminated "merit" as being the sole criterion for wage increases for the employees, and set forth its economic package in dollar amounts. At the time, Blankenship indicated he would recommend the Union's proposal to Respondent's president, Robert Leatherman. All of the parties then adjourned to a restaurant to celebrate the satisfactory conclusion of contract negotiations.

The next and last bargaining session was held on April 17, 1980, and at this meeting Blankenship indicated that Respondent was not changing any of its proposals from the *telegram* sent to the union negotiators (G.C. Exh. 10) with but two exceptions—a lead person rate would call for a 15-percent increase, but only on the basis of merit, and Blankenship stated that the Union would have no input concerning who would receive merit increases. Management would inform the Union who received merit increases and how much they would receive. Respondent further indicated that it would maintain ceilings on merit increases. Miller asked Blankenship why should there be ceilings on merit increases. Blankenship indicated that Respondent would abide by the ceilings but it would agree to move the ceiling for merit increases up to 15 percent for a lead person. The discussion deteriorated at this juncture and no further meetings in respect to collective bargaining ever occurred between the parties.

It is further alleged that Respondent failed to bargain in good faith in that on or about February 6, 1980, it proposed an agency-shop provision, but on or about February 12, 1980, withdrew its agency-shop provision and has proposed an open shop.

Union negotiator Miller testified that the bargaining session on February 5, 1980, began with Blankenship holding a packet of papers in his hand which he indicated was Respondent's latest proposal, and stating that the proposal would "wrap everything up," but he could not present it until he reviewed it with Chuparkoff and Leatherman, and then apologized to the union negotiators for not mailing the proposal earlier.

Miller testified that on the following day at the February 6 session, Blankenship appeared with the same packet of papers he had with him the day before, but the papers were now covered with red marks, and Blankenship stated, "Gentlemen, last night I got me an ass-chewing . . . Mr. Leatherman and I went over this entire proposal and it is just not acceptable where he is concerned so he told me what to present to you." Then, according to Miller, Blankenship presented his counterproposal by going down the list in a "curt fashion." Miller stated that at this time there were approximately 30–40 issues on the table, and that the Union's position prior to this meeting was that the union-security provision in the contract should be a union-shop clause, but that Blankenship's brief response to the Union's proposal of union shop was an agency shop.

Less than a week later, on February 12, Blankenship gave a new response to the union-security issue. During negotiations that day a conversation had occurred between Respondent's attorney, Chuparkoff, and the Union's attorney, Miller, concerning agency shop versus union shop. Chuparkoff maintained that an employee should be given the right to choose whether or not to join the Union and whether to pay dues. Miller then replied that an agency-shop provision meant that all employees had to pay dues and were merely given the choice as to whether or not they wished to join the Union. Miller testified that at this time they wished to join the Union. Miller testified that at this time Chuparkoff turned to Blankenship and asked him if this was correct, and Blankenship replied, "Well, an agency shop provision is really something like a modified open shop," and then Blankenship continued with more discussion but basically taking the position that an agency shop and an open shop were pretty much the same thing. Miller stated that he took issue with Chuparkoff and Blankenship on this interpretation. According to Miller, attorney Chuparkoff was not an experienced negotiator, but Blankenship had a history of participating in bargaining negotiations for a number of years, and Miller then specifically recalled that Blankenship took the position at this meeting that agency shop and open shop were pretty much the same thing, and that at that juncture Respondent's position was for an open shop—changing from an agency shop—and that Respondent maintained this position until negotiations ended.

Attorney Chuparkoff testified that the *Union* never modified its position and proposal as to a union shop, but that Blankenship "kept on saying 'agency shop'" and Respondent's negotiators "never changed," but the Union disagreed by definition of what it meant. Blankenship testified that throughout the negotiations Respondent maintained that the employees should have the right of choice to be in the Union or not to be in the Union, and that the proposal he made at the meeting on February 6 was for a "modified agency clause," but that he entitled it an "agency shop" to make it "more palatable" to the Union. Blankenship then went on to testify as follows:

> But, essentially, it provided that the employees who wanted to be members could and would made a decision. The ones who currently worked for the Company within 30 days, they would withdraw from the Union. Anyone who would not, they would have 30 days from the date of their employment to make up their minds as to if they wanted to join the Union. So to speak, an escape clause is actually what it was termed. They had a right to join or not to join. It was up to them.

Blankenship stated that he did not modify this proposal at any later time, but testified that this issue caused a breakdown in the negotiations.

Counsel for Respondent points out that, when the Union made its first initial proposals in August 1979, it handed Respondent a packet of proposals that contained language which provided that the Union reserved the right to add or to delete from those proposals, and since the Union acknowledged that Respondent had also a right to withdraw or delete its proposals—then it would seem logical that the Union waived any claim that it might have had for Respondent withdrawing their proposal. Moreover, argues Respondent, a closer look at the

actual facts surrounding the agency/union-shop matter will show that management withdrew its proposal of a "strict agency type" clause—pointing out that Ted Chuparkoff did not have a background in labor relations and that Blankenship was the labor negotiator and the spokesman for Respondent, and had indicated that, if the employees wanted to join a union, or if they did not want to join a union, Respondent was not going to make them—and that the question then amounted to what was the definition of an agency shop, a modified agency shop, and a union shop—that there was much confusion in respect thereto and there were many negotiating statements made back and forth between the parties. Furthermore, maintains Respondent, the Union at no time ever accepted an agency-shop provision, or a modified agency-shop provision, but admittedly there was confusion on the part of Ted Chuparkoff as to what was an agency shop and what was a modified agency shop, and there was also confusion between Miller and Ray Blankenship as to what the definition of an agency shop was—therefore, it would seem ludicrous that when there was so much confusion as to the definition of a particular term, that management could be held to have committed an unfair labor practice on the basis of agreeing to one type of shop and then withdrawing same, when the testimony is resplendent within the fact that the parties were not sure as to what they were agreeing to anyway, and that no agreement had actually been reached, nor would the Union agree to a less-than-union-shop provision, and that this cannot form the basis for an unfair labor practice allegation.

Respondent's chief negotiator, Blankenship, agreed, in accordance with the credible testimony of both Archer and Miller, that Respondent's position as to the Union's proposed union shop was a flat rejection, and that Respondent's proposal was entitled an "agency shop," as aforestated. The record shows that this proposal was made on February 6, 1980, but less than a week later, on or about February 12, 1980, Blankenship insisted that when he proposed an agency shop on February 6, he really meant an open shop, and up to the last negotiations in April 1980, Respondent continued to insist upon an open shop. I am in agreement with the General Counsel that it strains credulity that Blankenship, a representative with many years of negotiating experience, would not know the difference between an agency shop and an open shop, and Blankenship's testimony that when he proposed an agency shop on February 6 he really meant an open shop on February 6, he would have stated that management meant an open shop.

An agency shop is, of course, a far different type of union-security provision, and its operational aspects do not equate to those of an open shop. In essence, Blankenship *admits* that on February 6, whether to make it more "palatable" or not, he did propose an agency shop, but then his subequent testimony shows, as detailed earlier herein, that he ended up proposing an open shop.

It is also alleged that Respondent failed to bargain in good faith in that, during February and March 1980, Respondent's negotiators indicated to the Union a lack of authority to negotiate.

Miller stated that at the opening of negotiations in August 1979, Blankenship had indicated that he was the chief negotiator for Respondent and had authority to bind Respondent—this was in response to Business Representative Archer's question as to who had authority to bind Respondent, but, at a later date, according to Miller, Blankenship indicated that he no longer had the authority to bind Respondent.

This record shows that a bargaining session was held in Akron on February 26, 1980, where Respondent was represented by Attorney Chuparkoff and Administrator Pucillo. When Miller noticed that Blankenship was not present at this session, he then inquired as to his whereabouts, and Chuparkoff responded by saying that Blankenship would no longer represent Respondent in negotiations, and that the Company would either be represented by himself or Pucillo. After this meeting, however, Attorney Chuparkoff never attended any further negotiations sessions, and Blankenship then reappeared.

Miller testified that at the negotiating session on March 5, 1980, Blankenship requested that he and Archer meet with him privately away from the negotiating room, and they agreed to do so. According to Miller, Blankenship then stated that he had received a communication from Respondent in which President Robert Leatherman had fired him, but that on the following day he had received communications from Respondent rehiring him specifically for the one session on March 5. Blankenship also told Miller and Archer that this latest communication said nothing about representing Respondent after March 5, and then explained to Miller and Archer that he had responded to the above telegram by sending a communication to Respondent advising that he would not accept responsibility for any of the negotiations after February 6. Miller also testified that on this occasion Blankenship further told him that he had no authority to bind the Company and he did not know why he was at the negotiating session, and that no one at the bargaining table had any authority. In response to Miller's question as to which of Respondent's representatives had the authority since Blankenship did not, Blankenship replied no one else at the table had authority—only Leatherman had authority, and that Tony Pucillo had no authority to bind the Company—that Pucillo was only present to indicate the impact of the Union's proposal on the operations of Respondent.

Miller referred to the arrival at negotiations of Attorney Thomas Palecek for the first time on or about March 21, 1980, by indicating that Palecek arrived a few hours late, and that he remembered the incident because Attorney Palecek offered his apologies by explaining that he was in his office that morning in "dungarees and a sweatshirt not anticipating having to leave the office," when he received a call from Leatherman asking him for the first time to represent Respondent. Miller believed that at this meeting Leatherman and his accountant were also present at the request of the Union, but they did not appear in the negotiating session and stayed in another room. It is not clear whether Blankenship was at this meeting on March 21, but Archer testified that about 90 percent of the time in this session was spent reviewing

and bringing Attorney Palecek up to date as to where they stood in the negotiations.

Leatherman testified that he hired Chuparkoff and Blankenship as his negotiators, and he instructed them to negotiate the best contract they could within the guidelines of the Company, and that he would meet with his negotiators before each negotiating session.

Blankenship testified that at the outset of the negotiations his role was that of chief spokesman for Respondent, and that at the first meeting he made it clear to the Union that he did not have the power and authority to bind Leatherman to an agreement, but that he could effectively recommend such. Blankenship stated that he continued in this capacity until an impasse was reached in April or May 1980. He also testified that, prior to going into meetings, he would sit down and go over strategy with Leatherman and get recommendations from him, and also to bring him up to date on the progress of the negotiations.

Counsel for Respondent argues that the nature of this particular allegation in the complaint seems to be that the negotiators for Respondent had authority to negotiate in August, September, October, November, December, and January, and did not have authority to negotiate in February and March, but then had authority to negotiate in April 1980. It is pointed out that from August 1979 through January 1980, Ray Blankenship, Ted Chuparkoff, and Anthony Pucillo were all present at the bargaining table throughout this period and that even Leatherman was present at the first meeting, and that he was also available by telephone; that the Union had not raised the question that these same people did not have authority to negotiate from August through January and, in fact, proposals were made to the Union during this period of time. Moreover, these same negotiators were present at all of the February meetings and, in fact, a package offer was made to the Union in February containing an economic proposal on wages, and which had been authorized by Leatherman. In addition, maintains Respondent, other proposals were made in March 1980, particularly with regard to jury duty and fringe benefits, and, if these proposals were accepted by the Union, how can the Union now say there was no authority to negotiate during this period of time.

Miller testified and admitted that, in August, September, October, and November 1979, he believed that Blankenship had the authority to negotiate for Respondent, but stated that, after the December 10, 1979, meeting (wherein Blankenship had indicated to Miller and Archer that Leatherman had not made up his mind whether he would sign a contract), his belief concerning the authority of Blankenship and Chuparkoff was considerably shaken.

I find that the fourth indicia of bad-faith bargaining is in the area of lack of authority to either negotiate for Respondent or bind Respondent. As pointed out, there is a considerable amount of evidence in this record revealing that both Chuparkoff and Blankenship indicated from time to time that they did not have sufficient authority in these areas. Credited testimony indicates that in later February 1980 Chuparkoff told union negotiators that Blankenship no longer had authority to bind Respondent. Then, in early March, Blankenship reappeared and told Miller and Archer that Respondent had discharged him and had only rehired him for the one meeting, and then further stated that he would not accept responsibility for negotiations after February 6, that he did not have authority to bind Respondent and neither did anyone else, and did not know why he was present at the negotiations on this particular occasion.

It should be noted that the statements attributed to Respondent's negotiators Chuparkoff and Blankenship in these respects are not specifically denied. Blankenship merely suggested that he was the chief spokesman until an impasse was reached in April or May 1980.

Respondent's attorney, Thomas Palecek, entered the negotiations on March 21, 1980, as aforestated, and informed the Union that he was not going to override any of the agreements already made, but would "make sure" that management knew what they had agreed to. He also informed Miller and Archer that Blankenship "would remain exactly as he had been at the beginning of the negotiations."

Although an employer is not required to be represented by an individual possessing final authority to enter into agreement, this is subject to a limitation that it does act to inhibit the progress of the negotiations. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 1780*, 244 NLRB 277 (1979). The degree of authority possessed by the negotiator is a factor which may be considered in determining good-faith bargaining. *Lloyd A. Fry Roofing Company* v. *N.L.R.B.*, 216 F.2d 273, 275 (9th Cir. 1954).

In the instant case Respondent allowed its chief negotiator to agree to numerous contract proposals over a rather prolonged period of time, and then later apparently fired and rehired him, but with open admissions to the Union by Blankenship, wherein he, himself, seriously questioned his own authority, and such changing and confusing circumstances could only serve to disrupt and impede the bargaining process. Therefore, I have found that Respondent's failure to vest its chief negotiator with sufficient authority to conduct negotiations and by rescinding his authority in February and March 1980, also constitutes evidence of bad-faith bargaining by Respondent.

Turning now to the sequence of events following the last negotiating session. This record shows that on June 4, 1980, Union Representative Archer requested reinstatement for all 20 strikers listed on General Counsel Exhibit 6 by advising Administrator Pucillo, in person, that "these people are ready, willing and able to come back to work. When are you going to put them back?" Pucillo then informed Archer that he had replaced all of them.[12] However, on June 18, 1980, at a hearing before the Ohio Bureau of Unemployment Compensation concerning whether the strikers would receive unemploy-

[12] The document handed to Pucillo on the date here in question—G.C. Exh. 6—stated, *inter alia*, that on June 4, 1980, the strike and picketing would stop, and that "the undersigned employees hereby request reinstatement and are immediately available and willing to return to their former employment." Under the circumstances here, this must be deemed an unconditional offer to return the strikers.

ment compensation, Pucillo admittedly advised the Bureau of Unemployment Compensation, in Archer's presence, that the strikers were discharged for violation of company policy by not reporting that they were off work at the time of the strike. At the hearing before me, Pucillo admitted that he had replaced all of the strikers with new hires, and at no time did he or any other representative of management notify the Union that Respondent was setting up a preferential hiring list wherein the 20 strikers would have preference as to hire in the event any strike replacements left Respondent's employ.

Roy Archer testified as to Respondent's refusal to reinstate the strikers and discharging them for allegedly violating company policy by not reporting they were off work—notwithstanding the fact that the Respondent had notice of the Union's intentions to strike, as aforesaid. Archer also testified as to a union meeting held in March 1980, at which the employees authorized the Union to go out on strike because of the state of negotiations between the parties, and testified that a picket line was then established around 7 a.m. on April 21, with signs at the picket line indicating, "UFCW, District Union 427 on Strike," and the name Parkview was also penned in on the sign.

## Final Conclusions

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with representatives of its employees. As defined in Section 8(d) of the Act, "bargain collectively" requires the mutual obligation of the employer and the representative of its employees "to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."

Recently, in *United Contractors Incorporated, JMCO Trucking Incorporated, Joint Employers*, 244 NLRB 72, 73 (1979), the Board defined an employer's obligation in a bargaining situation stating:

> Section 8(a)(5) of the Act establishes a duty "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *N.L.R.B.* v. *Herman Sausage Company, Inc.*, 275 F.2d 229, 231 (5th Cir. 1960). As the Supreme Court stated in *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO* [*Prudential Insurance Company of America*], 361 U.S. 477, 485 (1960):
>
> > Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.
>
> This obligation does not compel either party to agree to a proposal or to make a concession. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952). However, the Board may, and does, examine the contents of the proposals put forth, for "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." *N.L.R.B.* v. *Reed & Prince Manufacturing Company*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 364 U.S. 887.

The standard for assessing whether or not a particular course of bargaining meets the tests of "good faith" was well stated by Administrative Judge Arthur Leff, which the Board adopted in *"M" System, Inc., Mobile Home Division Mid-States Corporation*, 129 NLRB 527 (1960), where it is said (at 547):

> Good faith, or the want of it, is concerned essentially with a state of mind. There is no shortcut to a determination of whether an employer has bargained with the requisite good faith the statute commands. That determination must be based on reasonable inference drawn from the *totality* of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. The employer's state of mind is to be gleaned not only from his conduct at the bargaining table, but also from his conduct away from it—for example, conduct reflecting a rejection of the principle of collective bargaining or an underlying purpose to bypass or undermine the Union manifests the absence of a genuine desire to compose differences and to reach agreement in the manner the Act commands. All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation. [Emphasis supplied.]

Applying the above principles to the instant case, and even accepting the fact that, by February 1980, the parties had resolved most of the noneconomic matters, nevertheless, I conclude and find that substantial evidence in this record supports the conclusion that Respondent refused to bargain with the Union in good faith in violation of Section 8(a)(5) of the Act, and such finding is based on the *totality* of Respondent's conduct both at and away from the bargaining table taking particularly in account the cumulative force of the various circumstances entering into this case.

As pointed out, although Respondent and the Union met on numerous occasions between August 1979 and April 17, 1980, Respondent did not bargain with the intent of reaching an agreement. First of all, its chief negotiator indicated in December 1979 that Respondent's president, Leatherman, had not made up his mind whether he would sign a contract with the Union. On February 6, 1980, Blankenship framed his initial monetary proposal so that several employees in the unit would have even received less wages than they were already getting, and a week or so later withdrew his agency-shop proposal in favor of an open shop. Moreover, in February and March 1980, negotiators for Respondent were undergoing a serious division in their ranks with numerous con-

flicts surrounding their status, and which all indicated a definite lack of authority to negotiate.

In the final analysis, Respondent was willing to reach accords on noneconomic matters where extra costs amounted to very little or nothing, and in most instances these agreements or accords only resulted from the Union accepting Respondent's proposal. Then in a negotiation session in late February 1980, a few weeks after Respondent did make their economic proposal, and which reduced wages to several employees, the Union noticed that Blankenship was not present, and were then notified that the chief negotiator could no longer bind Respondent, but at the next session in early March, Blankenship returned to the negotiations, but with the announcement that he was only rehired for one meeting and also with the information that he has no authority to negotiate nor does anyone else. Attorney Thomas Palecek was then suddenly hired by Leatherman to represent Respondent, and by informing the Union that he (Palecek) wanted to make sure management knew what they had agreed to—placed at least some of the proposals and accords previously agreed to on a more or less tentative basis pending his review, but with assurances to the Union that Blankenship would "still remain and function as he had from the beginning." Then in April 1980, right around the time of the initial strike deadline, Blankenship sent a telegram to the Union accepting numerous proposals and making economic offers, but at the last negotiating session amply surrounded his economic proposals with such restrictions that the Union could not accept them. In essence, the Union was right back where it started from when negotiations commenced, but now with the full realization that, whenever any real progress was made in the important segments of the negotiations, all or most of that progress was continually subject to needless delays, sudden changes, and outright repudiations of agreed-on proposals, along with the introduction by Leatherman of new proposals, new negotiators or changing the status and authority of those still in his service. This is not bargaining in good faith.

As pointed out, within the context of bad-faith bargaining, the unit membership voted to strike, and thereby engaged in an unfair labor practice strike commencing April 21, 1980, which was caused and prolonged by Respondent's unfair labor practice. On June 4, 1980, Union Business Representative Roy Archer unconditionally requested reinstatement for all striking employees.[13]

In the instant case, Respondent has never offered immediate and unconditional reinstatement to the striking employees who made it clear through their bargaining representative that they wished to return. Rather, its response was to discharge them for allegedly violating a company rule for failure to notify Respondent that they were not reporting for work on April 21, 1980—the first day of the strike. As indicated, Respondent was well aware of the employees' intentions to go out on strike having received written notice to this effect on April 2 and 9, 1980.[14] Furthermore, having complied with the statutory requirements for giving Respondent notice, the Union did not hide its intentions while it was on the picket line, but identified who it was striking against on its picket signs as soon as the strike commenced. Therefore, the reason given by Pucillo for discharging the strikers at the Bureau of Unemployment Compensation hearing on June 18, 1980, was a mere pretext to mask its intention of discharging its employees for having engaged in concerted protected activity. Moreover, on June 4, 1980, Respondent had an obligation to offer immediate and full reinstatement to its returning unfair labor practice strikers, and its failure to terminate strike replacements in order to make room for these strikers also violated Section 8(a)(3) of the Act.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that on June 4, 1980, Respondent refused to timely reinstate the striking employees upon their unconditional offer to return to work from an unfair labor practice strike, it is recommended that they offer those employees named in Appendix A, attached hereto, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered due to the discrimination practiced against them by paying each of them a sum equal to what he would have earned, less any net interim earnings, plus interest. Backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, 291–294 (1950), and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[15]

Having further found that Respondent has unlawfully refused to bargain collectively with the Union, I shall recommend that, upon request, it be ordered to do so concerning rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union and Local 200 are labor organizations within the meaning of the Act.

[13] It is pointed out by Respondent that Roy Archer did not talk to the three strikers listed on the second page of G.C. Exh. 6, and that the strikers wanted to return to their same positions—therefore, argues Respondent, there was no unconditional offer to return. From all the surrounding circumstances in this record, Archer was given ample authority to request reinstatement for all the strikers, and as unfair labor practice strikers they were immediately entitled to their jobs back or, if the positions no longer exist, to substantially equivalent jobs. The burden is on the employer to offer reinstatement to unfair labor practice strikers, notwithstanding the fact that it may have to terminate striker replacements to make room for returning strikers.

[14] See G.C. Exhs. 8 and 9.

[15] Also see *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

3. By engaging in conduct described and detailed in section III, above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act.

4. The unit set forth herein constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. Since on or about February 12, 1976, and at all material times herein, Local 200 represented a majority of employees in the appropriate unit, and has been the exclusive representative of said employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.[16]

6. Respondent has refused to bargain with the Union in violation of the Act.

7. The strike starting on April 21, 1980, was an unfair labor practices strike.

8. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[17]

The Respondent, Parkview Nursing Center II Corp., Warren, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 200 as the exclusive bargaining representative of its employees in the appropriate unit as described and set forth herein.

(b) Refusing to reinstate and/or discharging or otherwise discriminating against employees for engaging in concerted union activity.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the polices of the Act:

(a) Recognize and, upon request, bargain collectively with the aforesaid Union or Local 200 as the exclusive representative of all the employees in the above-described unit, and, if an understanding is reached, embody such understanding in a signed agreement, provided, however, that nothing herein shall be construed to require Respondent to vary or abandon the wage rate or benefit changes made, or to prejudice the assertion by its employees of any rights they may have emitting therefrom.

(b) Make whole those employees refused reinstatement for any loss of earnings by reason of Respondent's unlawful conduct as outlined in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business and Nursing Home copies of the attached notice marked "Appendix B."[18] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 8, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

[16] The General Counsel contends, and with no evidence otherwise I am in accord, that the certification year would only begin to run from the date of the U.S. Court of Appeals decision (May 24, 1979), and therefore there was an irrebuttable presumption from the above date to May 24, 1980, mandating that Local Union 200 enjoyed majority status. Further, that Local 200 continued to enjoy majority status after May 1980 because of Respondent's unfair labor practices, as all detailed previously herein.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX A

| | |
|---|---|
| Betsy Adams | Rene Maler |
| Anna Benard | Barbara Morgan |
| Mary Ellen Carroll | Mozel Robertson |
| Marie Cleveland | Martha Rodgers |
| Anna Dean | Diane Smolinsky |
| Sue Dumira | Ersie Stubbs |
| JoAnn Finch | Cheryl Thomas |
| Blanche Hughley | Anne Tinsley |
| Diane Jones | Sheila Wagoner |
| Kimberly Keeder | Marion Williams |

## APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the

National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with the Union and/or Local 200.

WE WILL NOT refuse to reinstate strikers, nor will we lay off, discharge, or otherwise discriminate against employees because of union activities.

WE WILL NOT discourage membership in the Union or Local 200, or any other labor organization, by discriminating against employees in regard to their hire and tenure of employment or any terms and conditions of employment.

WE WILL NOT in any other manner interfere with our employees' exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL recognize and bargain collectively, upon request, with the Union named herein or Local 200 as the exclusive representative of all the employees in the bargaining unit described herein with respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody it in a signed contract.

WE WILL offer reinstatement to those employees refused reinstatement on June 4, 1980, and give them backpay, plus interest, as set forth in the Decision of the Administrative Law Judge.

PARKVIEW NURSING CENTER II CORP.